Chin Yoke Teng & Anor v William Ui Ye Mein

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–22–363 OF 2001
MOHD HISHAMUDIN J
9 NOVEMBER 2004

Civil Procedure — Parties — Description of plaintiff — Infant — Whether unborn child can commence action via next friend — Rules of the High Court 1980 O 76 r 2(1) — Whether unborn child has legal personality to sue

The first plaintiff sued the defendant for the tort of breach of promise to marry. She also included her 30-weeks old unborn child as the second plaintiff, citing herself as the next friend pursuant to O 76 r 2(1) of the Rules of the High Court 1980 ('the RHC'). The issue before the court was whether an unborn child has a legal personality to sue. Counsel for the plaintiffs submitted that an unborn child has the legal personality to sue. The deputy registrar dismissed the application. The plaintiffs appealed.

Held, dismissing the appeal:

There is no authority whether statutory or case law that states that an unborn child has the legal personality to sue and as far as 'human being' is concerned, it means a living human and has never been interpreted to include the unborn child. Thus when our constitution and our laws speaks of a 'person' (and conferring on the 'person' the various rights, duties and obligations), they mean (again putting aside artificial persons) an existing natural person, and human being, and not a yet to be born child being, that is to say, a human foetus in conception. Therefore, in the context of O 76 r 1 of the RHC, 'infant' as referred to in r 1 must mean a child that has been born (see paras 14 and 15).

[**Bahasa Malaysia summary**

Plaintif pertama mendakwa defendan untuk tort keingkaran perjanjian untuk berkahwin. Beliau memasukkan bersama anaknya yang belum dilahirkan yang berusia 30 minggu sebagai plaintif kedua dan menyatakan dirinya sebagai sahabat wakil di bawah A 76 k 2(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Isu di hadapan mahkamah adalah sama ada seorang anak yang belum dilahirkan mempunyai keperibadian undang-undang untuk mendakwa. Peguam plaintif menghujahkan bahawa seorang anak yang belum dilahirkan mempunyai keperibadian undang-undang untuk mendakwa. Penolong pendaftar menolak permohonan tersebut. Plaintif merayu.

Diputuskan, menolak rayuan:

Tiada otoriti sama ada berkanun atau kes undang-undang yang menyatakan bahawa seorang anak yang belum dilahirkan mempunyai keperibadian undang-

undang untuk mendakwa dan setakat ini 'manusia' bererti seorang insan yang hidup dan tidak pernah ditafsirkan termasuk anak yang belum dilahirkan. Dari itu, apabila perlembagaan dan undang-undang kita merujuk kepada 'orang' (dan memberikan 'orang' berbagai hak-hak, tugas-tugas dan tanggungjawab), ianya bermakna (sekali lagi tidak mengetepikan orang bukan asli) orang-orang yang wujud, insan yang hidup dan bukannya seorang yang belum dilahirkan lagi, iaitu anak di dalam kandungan. Oleh yang demikian, dalam konteks A 76 k 1 KMT, 'budak' yang dirujuk di dalam k 1, semestinya bermaksud seorang anak kecil yang telah dilahirkan (lihat perenggan 14 dan 15).]

Notes

For cases on description of plaintiff, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 4199.

Cases referred to

Dehler v Ottawa Civic Hospital et al [1979] 25 OR(2d) 748; 101 DLR (3d) 686 (refd)
Dehler v Ottawa Civic Hospital et al 117 DLR (3d) 512 (folld)
Elliot v Lord Joicey and Others (1935) AC 209 (dist)
Medhurst v Medhurst [1984] 9 DLR (4th) 252 (refd)
Paton v British Pregnancy Advisory Service Trustees [1978] 2 All ER 987 (refd)
Smith v Fox (1922) 53 OLR; (1923) 3 DLR 785 (refd)
Villar v Sir Walter Gilbey Baronet (1907) AC 139 (dist)
Williams v The Ocean Coal Co Ltd (1907) KB 422 (dist)

Legislation referred to

Child Act 2001
Courts of Judicature Act 1964
Interpretation Acts 1948 and 1967
Rules of the High Court 1980 O 14, O 76 r 1, 2(1)
Workmen's Compensation Act [UK] 1897 to 1945/1906

Chan Tse Yuen (Chan Tse Yuen & Co) for the plaintiffs.
Rengeswari (Rao & Kamal) for the defendant.

Mohd Hishamudin J:

[1] Does an unborn child have a legal personality to sue? This novel issue is before me in this appeal — an appeal by the second plaintiff from the decision of the learned deputy registrar to the judge in chambers. In her decision, the learned registrar had dismissed the second plaintiff's application for summary judgment pursuant to O 14 of the Rules of the High Court 1980 ('the RHC').

[2] I have dismissed the appeal with costs. **A**

[3] I shall state briefly the background acts.

[4] The first plaintiff at the material time was a spinster. In her statement of claim, she alleges that after having met the defendant and followed by a few months of courtship, the latter promised to marry her. Believing this promise, she agreed to cohabit with him. And out of this intimate relationship, the first plaintiff, five years later, conceived the second plaintiff, the child of the defendant. **B**

[5] The first plaintiff alleges that the defendant has, renegade on his promise to marry her. She now sues him for the tort of breach of promise of marriage. **C**

[6] In this action, the first plaintiff adds her 30 weeks old unborn child as the second plaintiff, citing herself as the next friend (purportedly in compliance with O 76 r 2(1) of the RHC). However, I am not quite clear as to the second plaintiff's cause of action. **D**

[7] Order 76 r 2(1) provides:

> 2 (1) A person under disability may not bring, or make a claim in, any proceedings except by his next friend and may not defend, make a counterclaim or intervene in any proceedings, or appear in any proceedings under a judgment or order notice of which has been served on him, except by his guardian *ad litem*. **E**

[8] Order 76 r 1 defines 'person under disability' as follows:

> 'person under disability' means a person who is an infant or a patient. **F**

[9] Neither the RHC nor the Courts of Judicature Act 1964 defines 'infant'. But the Interpretation Acts 1948 and 1967 defines 'infant' as:

> 'infant' has the same meaning as minor.

[10] The Interpretation Acts 1948 and 1967 defines 'minor' as: **G**

> 'minor' means a person who has not attained the age of majority prescribed by the law applicable to him.

[11] The Interpretation Acts then proceed to define 'persons' (which definition is not helpful for our purpose) as follows: **H**

> 'person' includes a body of persons, corporate or unincorporated.

[12] Perhaps it would not be out of place to add here that the Child Act 2001 defines 'child' as a person below the age of 18. This is in accordance with the United Nation Convention on the Right of the Child (UNCRC). **I**

[13] The defendant admits having cohabited with the first plaintiff. The defendant also admits that he is the father of the unborn child — the second

plaintiff. However, the defendant denies having made any promise of marriage to the first plaintiff.

[14] In my judgment, although the unborn child has life and it enjoys certain rights under our laws and protected by the Penal Code from harm, yet I know of no authority (statutory or case law) that states that an unborn child has the legal personality to sue. Indeed, as far as I am aware of the reported cases, this issue has never been raised before in this country. Our legal system only confers on natural persons (for the moment we are not concerned with artificial persons such as companies and statutory authorities), that is to say, human beings, the right to sue and to be sued. And as far as I know 'human being' means a living human, and has never been interpreted to include the unborn child. Thus when our constitution and our laws (of course, these include the Interpretation Acts) speaks of a 'person' (and conferring on the 'person' the various rights, duties and obligations), to my mind, they mean (again putting aside artificial persons) an existing natural persons, an existing human being, and not a yet to be born child being, that is to say, a human foetus in conception.

[15] Therefore, in the context of O 76 r 1 of the RHC, based on my above view, 'infant' as referred to in r 1, must mean a child that has been born. It cannot be construed to include the unborn child.

[16] A similar position is adopted in other jurisdictions in the Commonwealth. In Canada, in *Dehler v Ottawa Civic Hospital et al* [1979] 25 OR(2d) 748; 101 DLR (3d) 686, the Ontario High Court held:

> 2 Has the plaintiff the status or standing to maintain an action on behalf of unborn persons for the injunctive and declaratory relief sought?
>
> This question may be approached by asking whether the members of the class the plaintiff represents, the unborn children whose lives may be terminated by abortion, could themselves have the required status or standing to prosecute the action and by considering, as is implicit in the question, the rights of the unborn children to the relief sought in this case. If the unborn cannot individually maintain the action, they cannot maintain it collectively, nor can it be maintained as a class action on their behalf. A representative cannot confer on those he represents status or rights which the law does not otherwise accord them. And here, it should be noted, the plaintiff claims entirely in a representative capacity asserting no personal rights enforceable in law or equity upon which to found this action.
>
> What then is the legal position of an unborn child? Is it regarded in the eyes of the law as a person in the full legal sense? Does it have the capacity in law to prosecute an action sounding in tort or to sue for injunctive relief? The short answer to the latter question is 'No'. While there can be no doubt that the law has long recognised foetal life and has accorded the foetus various rights, those rights have always been held contingent upon a legal personality being acquired by the foetus upon its subsequent birth alive and, until then, a foetus is not recognized as

included within the legal concept of 'persons'. It is only persons recognized by law who are the subject of legal rights and duties. 'Persons are the subjects of rights and duties: and as the subject of a right, the person is the subject of the correlative duty …. A person is such, not because he is human, but because rights and duties are ascribed to him. The person is the legal subject or substance of which the rights and duties are attributes. An individual human being, considered as having such attributes is what lawyers call a *natural* person: Pollock, First Book of Jurisprudence, p 110.

Since the law does not regard an unborn child as an independent legal entity prior to birth, it is not recognized as having the rights the plaintiff asserts on its behalf or the status to maintain an action. A foetus, what ever its stage of development, is recognized as a person in the full sense only after birth. In the law of torts or property, in cases involving inheritance or pre-natal injury, a foetus would have no rights if stillborn. Only upon live birth can rights acquired during gestation be asserted. In none of the decisions to which I have referred or of whom I am aware, has the foetus been regarded as a person before birth. In short, the law has set birth as the line of demarcation at which personhood is realized, at which full and independent legal rights attach, and until a child *en venire sa mere* sees the light of day it does not have the rights of those already born.

This judgment was upheld by the Ontario Court of Appeal on 22 October 1980 (see *Dehler v Ottawa Civic Hospital et al* 117 DLR (3d) 512).

[17] The above Ontario High Court judgment refers to an earlier High Court of Ontario case of *Smith v Fox* (1922) 53 OLR; (1923) 3 DLR 785. This case arose out of an automobile accident in which a pregnant woman was injured. The action was brought not only by her personally but also by her husband as next friend of the child, who was still unborn, to recover damages for injuries sustained as a result of the defendant's negligence. The action on behalf of the child was dismissed as premature.

[18] The learned judge, Riddell J observed (at pp 56–57 OLR, p 787 DLR):

I do not think that I am called upon at the present time to decide whether an action will lie at the suit of an infant for injuries received when *en ventre sa mere*—I can see no reason in reason or in law why it should not: but it is not necessary to decide that question. No right to recover money by way of damages can exist unless (1) the child is born alive and (2) there is injury capable of being estimated pecuniarly. Consequently, there can be no assessment of damages unless and until the birth and separate existence of the child—that is still hypothetical; and now, as at the teste of the writ, there is no certainty that there will be any such entity. Except for the purpose of declaratory decrees and the like, there can be no action without right accrued at the teste of the writ. This is not a case, I think, in which the Court would make a declaratory decree: and I think the action is premature.

[19] The decision in *Dehler* also referred to the English case of *Paton v British Pregnancy Advisory Service Trustees* [1978] 2 All ER 987. In that case a plaintiff/husband sought an injunction restraining his wife from causing or permitting an abortion to be carried out on her without his consent. The injunction was

refused on the ground that a husband has no right, enforceable at law or in equity, to stop his wife from having a legal abortion. The following passage appears in the reasons of Sir George Baker P (at pp 989–990):

> The first question is whether this plaintiff has a right at all. The foetus cannot, in English law, have any right of its own at least until it is born and has a separate existence from the mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant), and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia, and I have no doubt in others.
>
> For a long time there was great controversy whether after birth a child could have a right of action in respect of a pre-natal injury. The Law Commission considered that and produced a working paper in 1973, followed by a final report, but it was universally accepted, and has since been accepted, that in order to have a right the foetus must be born and be a child. There was only one known possible exception which is referred to the working paper, an American case, *White v Yup,* where the wrongful death of an eight month old viable foetus, stillborn as a consequence of injury, led an American court to allow a cause of action, but there can be no doubt, in my view that in England and Wales, the foetus has no right of action, no right at all, until birth. The succession cases have been mentioned. There is no difference. From conception the child may have succession rights by what has been called a 'fictional construction' but the child must subsequently be born alive. See per Lord Russell of Killowen in *Elliot v Joicey* (1935) AC 209 at p 233.

[20] The next case is the Ontario High Court case of *Medhurst v Medhurst* [1984] 9 DLR (4th) 252. In this case the father of an unborn child commenced an action on his own behalf and on behalf of the unborn child against his wife, her physician and a hospital. The court held that a next friend can act only for a person. An unborn, child is not a person. Hence the father could not act in the capacity of next friend.

[21] Encik Chan Tse Yuen, the learned counsel submitted that an unborn child has the legal personality to sue. He relied on the following cases for his proposition, namely:

(a) the House of Lords case of *Villar v Sir Walter Gilbey Baronet* (1907) AC 139;

(b) the English Court of Appeal case of *Williams v The Ocean Coal Co Ltd* (1907) KB 422; and

(c) the House of Lords case of *Elliot v Lord Joicey & Ors* (1935) AC 209.

[22] In my judgment, with respect, all these cases are irrelevant because none of them concern the issue as to whether an unborn child has the legal personality to sue.

[23] *Villar* concerned the right of an unborn child under a will. The child in question was *en venire sa mere* (in conception) at the time when the testator was

alive and was born three weeks after the testator's death. The issue in that case was whether the will in question could be construed such that the court could hold that, for the purpose of the will, the child was deemed to have been 'born' during the lifetime of the testator.

[24] *Williams* concerned the right of a posthumous child: whether the child was a 'dependent' under the (United Kingdom) Workmen's Compensation Act and thus entitled to the benefits under that Act.

[25] *Elliot* concerned the construction of a will and the issue as to whether a posthumous could benefit under the will.

[26] Accordingly this appeal is dismissed with costs.

Appeal dismissed.

Reported by Izzaty Izzuddin